United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7547

United States Court of Appeals
Second Circuit

NORTHEASTERN INDUSTRIAL PARK, INC. and
D. E. LONG, INC.,

Plaintiffs,

NORTHEASTERN INDUSTRIAL PARK, INC.,
Plaintiff-Appellant,

v.

LOCAL 294, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,

Defendant-Appellee.

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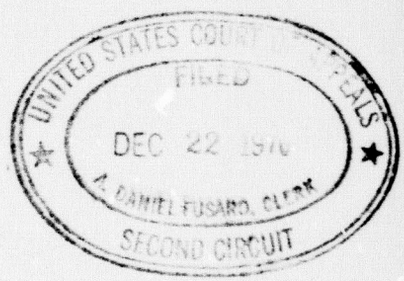

Docket No. 76-7547

BRIEF OF APPELLANT
NORTHEASTERN INDUSTRIAL PARK, INC

FRANK J. WILLIAMS, JR.
Attorney for Appellant
Office and P.O. Address
11 North Pearl Street
Albany, New York 12207
518–434-2127

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BRIEF OF APPELLANT, NORTHEASTERN INDUSTRIAL PARK, INC.*

The Appeal.

This is an appeal by the plaintiff Northeastern Industrial Park, Inc. from so much of an order and judgment of the District Court, Northern District of New York, as disallows the appellant's claim of certain legal expenses including attorney's fees as an element of damage sustained by the appellant as a result of certain unlawful picketing.

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*In this brief, the record is identified as "R"; trial examiner's decision is identified as "TXD". The page and line references are separated by a colon (e.g., record page 11 lines 8-11 is cited "R11:8-11").

The Action.

This action was brought by the appellant and an affiliated corporation, D. E. Long, Inc., under Section 303 of the Labor Management Relations Act (29 USC §187) for damages resulting from certain picketing activities determined in prior proceedings before the National Labor Relations Board (NLRB) to be illegal. The damages sought are legal expenses and attorney's fees incurred in prior injunction and NLRB proceedings.

Prior to trial the District Court by an order dated October 1, 1975, granted the appellant summary judgment on the issue of liability holding that the prior NLRB determination was res judicata on that issue as to Northeastern Industrial Park, Inc. (hereinafter called "Northeastern"). The motion for summary judgment placed before the Court the record of the prior proceedings.

The action then proceeded to trial on the issues of (1) the extent of compensatory damages to which the appellant Northeastern is entitled, (2) the liability of the defendant to the plaintiff D. E. Long, Inc. (hereinafter called "Long"), and (3) the damages, if any, to which Long was entitled. The Court found that the defendant was liable to Long for unfair

labor practice and granted it an award of damages in the sum of $5,154.00. It denied Northeastern's claim in the amount of $30,506.45 for damages for legal fees and expenses.

Prior Proceedings.

The appellant filed an unfair labor practice charge against the defendant on March 26, 1971, in response to certain picketing that commenced on March 25, 1971. On April 9, 1971, the District Court pursuant to an order to show cause granted a temporary restraining order from the bench ordering a halt to the picketing and thereafter on April 13, 1971, signed an order granting a temporary injunction against the picketing pending the ultimate determination by the NLRB of the unfair labor practice charge. The hearing on the charges proceeded on June 23 and 24, 1971, and thereafter on November 1, 1971, the NLRB trial examiner issued his decision finding and concluding that the defendant had violated section 8(b)(4)(i) and (ii)B of the National Labor Relations Act. Exceptions to the trial examiner's decision were filed by the defendant and certain cross exceptions were filed by Northeastern. On

April 14, 1972, a three-member panel of the National Labor Relations Board affirmed the hearing examiner's decision modified by the inclusion of certain of the cross exceptions and recommendations proposed by Northeastern enlarging the remedy granted Northeastern with respect to the noticing of the cease and desist order.

The Business of the Appellant.

Northeastern Industrial Park, Inc. owns and operates Northeastern Industrial Park which is a large private commercial and industrial storage site at Guilderland Center (Albany County), New York, (TXD 5:25-26). The park contains apprxoimately 500 acres (TXD 5:29) and is completely enclosed by a nine-or ten-foot chain-link fence (TXD 5:29-30). It is bounded on the west by county highway 201 and on the east by railroad tracks (TXD 5:30-31). A detailed drawing of the park is in evidence as plaintiff's Exhibit No. 7. Truck access to the park is provided through the use of two gates (shown on the exhibit as the "Main Gate" and "Gate 9") located along the west side of the park bounded by county highway 201 (TXD 5:34-36). These truck entry gates

are the only gates large enough to allow truck traffic (TXD 5:36-37). The park is bounded on the east by the New York Central Railroad (now the Penn Central Railroad) (plaintiff's Exhibit No. 7). Access to the park is also enjoyed by the Delaware and Hudson Railway (herein called "D & H") at a special railroad gate (TXD 2:34-35, 16:17-19). Inside the park are a number of buildings leased by Northeastern to various tenants (TXD 5:39, 6:2). Among these tenants at the time of the defendant's picketing were R & R Handling Centres, Inc. (called "R & R"), D. E. Long, Inc. (called "Long"), D & H, J.J. Newberry Co., Inc. (called "Newberry"), Two-Guys from Harrison, Inc. (called "Two-Guys"), Starrett-Modular Construction, Division of Starrett and Eken, Inc. (called "Starrett"), M & G Convoy, Inc. (called "M & G"), Distribution Unlimited, Inc. (called "Distribution"), and The State of New York (TXD 6:2-4). Through the D & H Railroad gate that railroad served R & R and other tenants in the park (TXD 16:19-20).

Commencement and Duration of Picketing.

The picketing commenced on the morning of March 25, 1971, at the two truck entry gates (TXD 8:30-33). Picketing also occurred at the D & H Railroad gate so that on March 29 train crews refused to bring trains across the picket line (TXD 16:15-17, 33-35). The picketing continued at these points until it was enjoined by a temporary restraining order on April 9, 1971, (TXD 12:24-27, 16:32-33).

Legal Action Taken by Northeastern.

To end the picketing Northeastern retained the services of eminent labor counsel Robert H. Jones III. He was first retained on April 1, 1971, (R7:5). Counsel prepared the charging party's (Northeastern's) participation in the Section 10-L injunction proceeding in the District Court interviewing its witnesses and preparing them for their testimony (R11:8-11) and otherwise prepared for and participated in the hearing for the temporary injunction that went forward on April 9 (R9:23-25) and prepared and submitted a post-hearing

brief (R11:17-19, 20-22). This proceeding resulted in the issuance of a temporary restraining order on April 9 (TXD 20:31-33) and culminated in an order granting a preliminary injunction on April 14 (R11:12-16). Thereafter Northeastern's counsel prepared for the substantive issues that were to be tried before the NLRB trial examiner preparing witnesses and examining the law in an effort to design the presentation to comport with those cases supporting Northeastern's position and to avoid problems that had beset others similarly situated (R12:3-15). Counsel participated in these hearings which took place before trial examiner Harry H. Kuskis on June 23 and 24 of 1971 and thereafter prepared and filed a brief (R12:16-20). In November of 1971 the trial examiner rendered his decision sustaining the position of Northeastern and the NLRB counsel (R12:21-25) but did not grant a remedy as extensive as that to which counsel felt Northeastern was entitled (R13:2-6). The union filed exceptions to the trial examiner's decision and a brief in support of such exceptions, counsel for the NLRB filed nothing, and counsel for Northeastern filed cross-exceptions addressed to the narrowness of the trial examiner's recommended remedy and a 77-page brief (in evidence as plaintiff's Exhibit 6) in support of these cross-exceptions

and covering the union's exceptions (R13:18-25, 14:1-2). The NLRB concurred with the view of counsel for Northeastern and enlarged its remedial order as requested (R14:3-7).

The Charges of Special Counsel.

For his services, Mr. Jones charged Northeastern $26,750.00 plus disbursements of $1,576.45 for a total charge of $28,326.45 (R22:20-25, 23:1-2). Northeastern paid the bill (R23:3-5).

Mr. Jones has testified that the fair and reasonable value of these services was in the neighborhood of $33,000.00 to $34,000.00 (R22:11-13). He testified that at the time of his services he was charging $85.00 an hour (R159:8-9) and that at the time the charge for services of this sort in New York City ran from $125.00 to $300.00 per hour and that in the Albany area the rate for labor counsel for management was approximately $100.00 per hour (R160:2-3, 14-19). Counsel's detailed time records, in evidence as plaintiff's Exhibits 1 through 5, inclusively, show that counsel invested a total of 396.3 hours of his own time. The hours are recorded by date. The hours are allocated between various categories of activity and are

recorded in tenths of an hour. Exhibit No. 1 details telephone activity, Exhibit No. 2 - correspondence relating to the NLRB proceeding, Exhibit No. 3 - correspondence relating to the injunction proceeding, Exhibit No. 4 - "Travel, Conferences, Hearing Preparation & Hearings", and Exhibit No. 5 - "General Work Preparing or Reviewing Law Memoranda, Opinions, Pleadings, Briefs, Agreements and Other Materials". The following is a summary of these exhibits:

Plaintiffs' Exhibit #		(1)	(2)	(3)	(4)
		T I M E (Hours)			
		Jones	Associate	Associate	Secretary
1	telephone calls	18.4	2.5	.2	3.9
2	correspondence (NLRB)	30.6	.7	-	-
3	correspondence (injunction)	6.4	-	-	-
4	hearing preparation and hearings	107.3	-	-	-
5	general	233.6	52.1	-	-
	Total	396.3	55.3	.2	3.9

Multiplying the total of column 1 by $85.00 produces a figure of $33,685.50.

Mr. Jones has testified that he has not charged Northeastern for associate or secretarial time and has further testified that the actual billing reflects an adjustment in the client's favor.

Mr. Williams' Services

Frank J. Williams, Jr., attorney for the plaintiffs in this proceeding, testified that during the period commencing March 25, 1971, through June 24, 1971, he performed various supportive legal services in connection with the injunction and NLRB proceedings. These services generally consisted of attending and participating in various planning and preparatory conferences and sessions and supportive functions during court sessions and sessions before the NLRB hearing examiner (R234-236). He testified that he had spent a total of 43.6 hours of time in the performance of such services and that in his opinion a fair and reasonable hourly charge for such supportive services is $50.00 and that based thereon the fair and reasonable value of such services is $2,180.00 (R236:17). He testified that the plaintiff Northeastern Industrial Park was billed for his services on a monthly basis, that the services rendered in connection with these matters were included in his regular monthly billings to Northeastern and that all such billings had been paid.

Total Cost of Legal Services.

The total of the charges to Northeastern for legal services as thus set forth in the testimony is $30,506.45.

LAW

POINT I

THE APPELLANT'S LEGAL EXPENSE IS PROPERLY RECOVERABLE AS AN ITEM OF DAMAGE.

A.

The Authorizing Statute

The statute[1] authorizes the victim of illegal secondary boycotting or picketing to recover "the damages by him sustained." Historically, the expenses of litigation have been considered recoverable damages where incurred as a natural and necessary consequence of the defendant's acts in proceedings taken by the injured party to prevent or reduce the damage which would be incurred by the continuance of the wrong which he has abated by resort to legal action.

13 NY Jur., Damages, §146, pg 651

22 Am Jur 2d, Damages, §169, pg 238

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[1] 29 U.S.C.A. §187 reads as follows:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Northeastern was placed in a peculiarly vulnerable position by the union's unlawful picketing. As a landlord charged with the security of a large industrial park tenanted by numerous commercial enterprises dependent upon the free and uninterrupted flow of commercial traffic to and from their premises Northeastern became immediately exposed to numerous potential tort claims rooted in any failure on its part to take all reasonable action to abate and secure the abatement of the unlawful picketing. To have done nothing, thereby allowing the picketing to continue indefinitely to the ongoing damage to the tenants, would have invited serious and extensive litigation. The NLRB found that all of Northeastern's above-mentioned tenants (i.e., R & R Handling Centres, Inc., D. E. Long, Inc., M & G Convoy, Inc., Starrett-Modular Construction, Two-Guys from Harrison, Inc., D & H Railway, J. J. Newberry Co., Inc. and Distribution Unlimited, Inc.) were affected by the picketing (TXD 29:15-27). All of these firms conduct substantial business in interstate commerce (TXD 3, 4 and 5).

Even in cases where the reaction of the injured party is not precipitated by the presence of dependent third party interests a substantial body of law has developed recognizing the incurrence of attorney's fees in injunction

and NLRB proceedings brought to end illegal picketing as an element of damage and allowing recovery.

H.L. Robertson and Associates v. Plumbers Local Union #519, 429 F2d 520

Refrigeration Contractors Inc. v. Local Union #211, Plumbers and Pipefitters, 501 F2d 668

Sheet Metal Workers, International Association Local Union #233 v. Atlas Sheet Metal Company of Jacksonville, 384 F2d 101

Gulf Coast Building and Construction Trades Council v. F.R. Hoar and Son Inc., 370 F2d 746

Local Union 984 Teamsters v. Humko Co., 287 F2d 231; cert.denied 366 US 962

Mason-Rust v. Laborers International Union #42, 435 F2d 939

Local 290, etc. v. I.E. Schilling Co., Inc., 340 F2d 286

Construction and General Laborers Local Union #438 v. Hardy Engineering and Construction Company, 354 F2d 24

B.

The Necessity of the Services Rendered by Counsel

Mr. Jones testified that he was first retained on April 1, 1971, at which time the plaintiff Northeastern had filed unfair labor practice charges against the defendant at National Labor Relations Board, Region Three's office in Albany, alleging illegal secondary boycotting (R7-8); that the matter required the best possible attention because the picketed client was an industrial park with railroad access and perimeter motor vehicle access at a number of points and there had been attempted picketing inside the park and actual picketing outside of the park at various locations presenting questions of quasi public property, as well as private property and some public property, and for the further reason that not long before Carrier Corporation in Syracuse had had a most unfavorable result in a case which had many similarities (R8); that the course of action involved two phases; first, an injunction proceeding in the District Court upon the petition of the National Labor Relations Board under §10-L of the NLRA to restrain picketing pending the board's determination of the substantive issue, and, secondly, the substantive hearing before the NLRB (R9-10). Counsel fully explained the necessity

of his participation on behalf of the plaintiff to fully secure the plaintiff's protection, pointing out that NLRB counsel is principally interested in enforcing the public right as distinguished from private rights, that the statute clearly envisions that the charging party has therefore a full right to appear and participate even if its position may differ somewhat from the position factually or legally taken by counsel for the NLRB, that the reason for this is that the board has institutional interests that sometimes differ from the interests of the charging party, and that, beyond this, attorneys representing general counsel tend to take very narrow positions that do not always produce the full measure of relief necessary to adequately protect the charging party (R15-18).

The vital importance and necessity of counsel's services and expertise in securing adequate assurance that that defendant's membership would honor the NLRB mandate and refrain from further illegal picketing and boycotting at Northeastern's premises is reflected in the board's enlargement of the remedy and the history of this particular defendant. The hearing examiner's determination contained a broad cease and desist order, and, to effectuate it, required (a) the

posting of notice at the defendant's meeting halls and offices for 60 days, and (b) the furnishing of a sufficient number of signed copies of the notice to the Regional Director for posting by the employers named in the proceeding (TXD 31). Counsel for Northeastern considered the relief too narrow (R13:4-6) although general counsel for the board was content to let the trial examiner's order stand (R13:22). Counsel for Northeastern then prep ed and filed a 77-page brief (plaintiff's Exhibit 6 in evidence) in support of the trial examiner's decision as far as it went, in answer to respondent's exceptions to this decision and in support of Northeastern's limited cross-exceptions to the decision and recommended order. This effort culminated in an NLRB order by a three-member board enlarging the remedial order so as to require (c) the mailing of the recommended notice by certified mail, return receipt, to every member of the respondent union and the submission of a list of the membership and the return receipts to the Regional Director, and (d) the mailing by certified mail, return receipt requested, of a copy of the recommended notice to every employer and employer association having a collective bargaining agreement with the respondent union and the submission of a list of such employers and associations and the return receipts to the

Regional Director (NLRB decision, pg 3). Counsel has testified that this is the most extensive remedial order the National Labor Relations Board has issued against the union in its history (R14:7-9).

The defendant's history makes such relief essential. The proclivity of this defendant to violate section 8(b)(4) of the Act has been noted by the trial examiner (TXD 30:2-34). This Court (Second Circuit) has recognized this defendant's past conduct and has noted that "the commission by. . .[Local 294] of similar unlawful acts may fairly be anticipated." [National Labor Relations Board v. Local 294, etc. (Van Transport Lines), 298 F2d 105, 49 LRRM 2315 (2nd Cir. 1961)]. As counsel has pointed out in his brief (plaintiff's Exhibit 6, pgs 7-9) the case presents one further example of Local 294's long and persistent history of defiance of the statutory restraints of section 8(b)(4)(B) over a period of more than 12 years [see, e.g.,: Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Bethlehem Steel Corporation and Local 106, International Union of Operating Engineers (AFL-CIO), 174 NLRB No. 6, 70 LRRM 1060, 1968-2 CCH NLRB §20,464 (1969) (violation of §8(b)(4)(D); Vincent v. Local 294, International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America (Bethlehem Steel Corporation), 424 F2d 124, 73 LRRM 2983, 62 CCH Lab.Cas. §10,787 (2nd Cir. 1970) (dismissing appeal from judgment of civil contempt for violation of §8(b)(4)(D)); National Labor Relations Board v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Island Dock Lumber, Inc.), 342 F2d 18, 58 LRRM 2518, 51 CCH Lab.Cas. §19,553 (2nd Cir. 1965) (violations of §§8(b)(4)(ii)(A) and 8(b)(4)(ii)(B), as well as §8(e)); Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al and K-C Refrigeration Transport Company, Inc., 124 NLRB 1245, 44 LRRM 1630, 1959-60 CCH NLRB §56,741 (1959), enf'd sub nom. National Labor Relations Board v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al, 284 F2d 887, 47 LRRM 2085, 41 CCH Lab.Cas. §16,626 (2nd Cir. 1960) (violation of §8(b)(4)(A)); McLeod v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 190 F Supp 129, 43 LRRM 2799, 36 CCH Lab.Cas. §65,319 (N.D.N.Y. 1959) (temporary injunction granted under §10(1)); Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers

of America, and The Great Atlantic and Pacific Tea Company, Inc., 173 NLRB 1491, 70 LRRM 1057, 1968-2 CCH NLRB §20,453 (1969) (violation of §8(b)(4)(B)); National Labor Relations Board v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Van Transport Lines, Inc.), 298 F2d 105, 49 LRRM 2315, 44 CCH Lab.Cas. §17,332 (2nd Cir. 1961) (violation of §8(b)(4)(B)); National Labor Relations Board v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Bonded Freightways, Inc.), 273 F2d 696, 45 LRRM 2425, 39 CCH Lab.Cas. §66,149 (2nd Cir. 1960) (violations of §8(b)(4)(A))].

Counsel has further pointed out (plaintiff's Exhibit 6, pg 66) that as this Court stated in National Labor Relations Board v. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 428 F2d 994, 74 LRRM 2289, 62 CCH Lab.Cas. §10,898 (2nd Cir. 1970), the Supreme Court long ago pronounced the standard for judging the permissible breadth of an injunction in labor cases:

> "The breadth of an order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is

> indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the [party] in the past. NLRB v. Express Publishing Co., 312 U.S. 426, 436, 61 S.Ct. 833, 85 L.Ed. 930 (1941)" [428 F2d at 999, 74 LRRM at 2291; emphasis added].

Indeed, in dealing with such a persistent violator securing the return to work by its membership required extraordinary effort and perseverance in the pursuit of an extraordinary remedy without which the proceeding would be likely to prove another "futile legal exercise." It was a task that NLRB counsel was not willing to pursue and, therefore, was left to plaintiff's counsel.

POINT II

THE CASE OF MEAD V. RETAIL CLERKS INTERNATIONAL ASSOCIATION LOCAL UNION 839, 523 F2d 1371, IS NOT PROPER AUTHORITY FOR THE DISALLOWANCE OF ATTORNEY'S FEES IN THE INSTANT CASE.

A.

The Lower Court's Reliance on the Mead Case

In October, 1975, while the instant case was being tried the Ninth Circuit rendered its decision in the case of Mead v. Retail Clerks International Association Local Union 839 (supra) upon which the District Court now bases its refusal to allow the plaintiff recovery of attorney's fees in the instant case. The Mead holding and its progenitor, Alyeska Pipeline Service Co. v. Wilderness Society, 421 US 240, assert the long held so-called "American Rule" that a litigant must bear the cost of its own attorney's fees except where recovery is authorized in four limited situations: (1) contract, (2) specific statute, (3) common fund theory, or (4) willful disobedience to a court order or similar objectionable conduct by a party (District Court decision, pg 4). The Ninth Circuit held that Section 303 (29 USC §187) contained no statutory authorization permitting the recovery of attorney's fees under the facts presented in that case.

B.

Mead Case Distinguished
from Case at Bar

The plaintiffs Mead were grocery store operators. The union had sought their agreement to a so-called "demonstrator clause" providing that food demonstrators passing out samples of particular products to store customers must be covered by all terms of the collective bargaining agreement regardless of whether the demonstrators were employed by the plaintiffs or by the supplier of the product being promoted. The plaintiffs rejected this clause as being illegal under section 8(e) of the Act. The plaintiffs also rejected other proposed provisions (not unlawful) relating to wages, health and welfare benefits, pensions, etc. The union called a strike and commenced picketing. The plaintiffs filed an unfair labor practice charge with the NLRB. The board agreed that the proposed "demonstrator clause" was illegal insofar as it applied to demonstrators who were not employees of the plaintiffs. The board ordered the union to cease striking to obtain such clause. The Meads then filed their Section 303 action for damages contending that they were entitled to recover all of their losses since one objective of the strike and picketing had been unlawful. The District Court agreed

with the plaintiffs and granted judgment awarding damages including attorney's fees for losses sustained until the union withdrew its demand for the demonstrator clause.

The Ninth Circuit Court of Appeals held that when a union exerts economic pressure to achieve both lawful and unlawful objectives and the consequences are not separable, damages cannot be recovered unless the unlawful objective was a substantial cause of the pressure. It, therefore, set aside the District Court's judgment and remanded for a determination of the factual issue of whether the unlawful objective was a substantial cause of the pressure.

It then discussed attorney's fees as an element of damage and concluded that the so-called "American Rule" would disallow a recovery of attorney's fees as compensatory damages under the facts of the case. In setting aside the District Court's award of damages including attorney's fees the Court pointed out that "in its present posture, the only portion of the judgment that would be sustained constitutes an award of precisely those attorney's fees that the board (and the Court of Appeals) would not make" -- referring to the failure to separate the lawful from the unlawful objectives of the union's conduct and the consequent inability to identify recoverable damages.

The Mead case did not involve, as does the case at bar, dependent third-party interests calling for protection. It cannot be considered authority for a general disallowance of such claims in situations where the litigation expense can be shown to be a natural and necessary consequence of the defendant's unlawful action to prevent or reduce damage which would otherwise occur.

C.

The Court was Improperly Concerned with "Board" Discretion

A principal rationale upon which the Mead court relied is that court awards of attorney's fees in subsequent Section 303 actions would clash with or circumvent board discretion in this area. The Court asserts "it is for the Board, not the courts, to determine whether the conflicting interests are best resolved by imposing litigation costs upon the defeated party before the Board."

This assertion overlooks the fact that the board has been given no clear statutory authorization to award litigation expenses or attorney's fees. The pertinent language [29 USC 160(c)] only authorizes the board "to take

such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" the Act. The words "affirmative action" connote that type of action ordinarily ordered by the board such as ordering the parties to engage in collective bargaining, to cease and desist from unfair labor practices, to refrain from secondary boycotts, to cease unlawful picketing, etc. The United States Supreme Court while not expressly passing on the question has nevertheless cast strong doubt on the authority of the board to award attorney's fees.

NLRB v. Food Store Employees Union Local #347, 417 US 1

Here, the Court notes at page 6 that the charging party's participation is primarily for the purpose of protecting its private interests whereas the board has the primary responsibility for protecting the public interest. Its orders, therefore, "must be remedial, not punitive, and collateral losses are not considered in framing a reimbursement order." The Supreme Court remanded to the Court of Appeals (District of Columbia) with direction that it be further remanded to the board for further proceedings. The Circuit Court had held that the NLRB should have ordered reimbursement of the union for counsel fees and litigation expenses where the employer was

found to have engaged in a deliberate pattern of unlawful anti-union conduct. The Supreme Court found that under the circumstances the Court of Appeals had improperly exercised its authority to modify board orders. In footnote 9 appended to the Supreme Court's decision at page 8, the Court notes

> "we thus have no occasion at this time to address the question of whether the board's broad powers under Section 10(c) 29 USC 160(c), to fashion remedies include power to order reimbursement of litigation expenses and excess organizational costs."

The Mead court in its above-quoted statement appearing at page 1381 actually misrepresents the position of the U.S. Supreme Court. The Mead court citing the Supreme Court case states as above quoted "it is for the board, not the courts, to determine whether the conflicting interests are best resolved by imposing litigation costs upon the defeated party before the board." Actually, the Supreme Court said at page 8

> "Congress has invested the Board, not the courts, with broad discretion to order a violator 'to take such affirmative action. . . as will effectuate the policies of [the Act]'."

D.

The Ninth Circuit Has
Since Modified its Stand

In a case as yet unreported the Ninth Circuit Court of Appeals has now in a Section 303 suit sanctioned an award of attorney's fees as compensatory damages incurred in securing a termination of illegal picketing.

Everett Sillman and Gerald Williams
d/b/a Hoskings Food Products v.
Teamsters Union Local 386, etc.,
78 Labor Cases, §11428 (May 3, 1976)

Here, the Court affirmed an award of $2,384.00 as legal fees and telephone expenses incurred in securing a termination of the illegal picketing as well as $1,728.00 paid for assistance in the presentation of evidence before the NLRB and other services.

CONCLUSION

For the reasons stated in the foregoing brief the decision and order appealed from should be reversed insofar as it denies plaintiff-appellant's claim for attorney's fees as an element of damages and such damages should be awarded to the plaintiff-appellant in the sum of $30,506.45.

RESPECTFULLY SUBMITTED,

Frank J. Williams, Jr.
Attorney for Plaintiff-Appellant.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NORTHEASTERN INDUSTRIAL PARK, INC. and
D. E. LONG, INC.,
Plaintiffs,
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LOCAL 294, INTERNATIONAL BROTHERHOOD OF
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HELPERS OF AMERICA,
Defendant-Appellee.

AFFIDAVIT
OF
PERSONAL
SERVICE

Docket No.
76-7547

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

FRANK J. WILLIAMS, JR., being duly sworn, deposes and says:

I am the attorney for the plaintiff-appellant in the within entitled action and I served two copies of the within plaintiff-appellant's brief upon Pozefsky, Tocci & Pozefsky on December 14, 1976, at 112 State Street, Albany, New York, by then and there personally delivery such copies to an adult person in the office of said Pozefsky, Tocci & Pozefsky said person having identified herself as a person employed in said office as a secretary.

Frank J. Williams, Jr.

Sworn to before me this

14th day of December, 1976.

Notary Public

CAROL C. [illegible]
Notary Public, New York
[illegible]
Commission [illegible] 78